NO. 87-595

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DEAN WITTER REYNOLDS, INC.
and HENRY DUKE
Petitioners,

vs.

BILLIE L. WEDERSKI,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

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QUESTIONS PRESENTED

In respondent's view, the questions presented are:

(1) Whether respondent's allegations to the effect that her consent to the arbitration provision was induced by fraud constitute a proper ground for denial of a summary motion to compel arbitration and stay the proceedings;

(2) Whether the Court of Appeal's silence in its opinion as to how or whether the issue of fraudulent inducement of consent to the arbitration provision should be tried was contrary to some provision of the Federal Arbitration Act.

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JURISDICTION

As we discuss more fully below, there is no jurisdiction for the review of the interlocutory orders of the California Supreme Court and California Court of Appeal because the orders do not constitute a final judgment and no special

circumstances exist which would warrant an immediate appeal.

Further, to the extent petitioners claim that the Court of Appeal erred in not specifically ordering a separate summary trial of the threshold issue of fraudulent inducement, the Court of Appeal's silence on this subject does not amount to a final judgment.

STATEMENT OF THE CASE

In her complaint, plaintiff and respondent Billie L. Wederski (hereinafter "Mrs. Wederski") specifically alleges that the arbitration agreements were induced by fraud (Opp.App.A, page 9a). The factual allegations establishing that the arbitration agreements themselves, as well as the other agreements, were induced by fraud are set

forth in a section of the complaint entitled "Fraudulent Inducement of the Arbitration And Choice of Law 'Agreements'" (Opp. App.A, page 9a). Five separate paragraphs describing the nature and manner in which the defendants fraudulently induced Mrs. Wederski to sign the arbitration agreements are set forth in this section of the complaint (Opp. App.A, pages 11a-13a).

Petitioners moved the trial court to compel arbitration and stay the proceedings. Mrs. Wederski responded by filing an opposition. Her opposition was supported by a seventeen page declaration that she signed under penalty of perjury. Mrs. Wederski's declaration contains numerous factual allegations describing and supporting her allegations contained in her complaint alleging that the arbitration agreements were induced by fraud.

The trial court granted the petitioners' arbitration petition and motion to stay in spite of Mrs. Wederski's complaint and papers opposing the arbitration petition. Accordingly, Mrs. Wederski filed a petition for a peremptory writ of mandate in the first instance in the California Court of Appeal seeking an order directing the trial court to vacate its order and to deny the arbitration petition and stay.

On April 14, 1987, the California Court of Appeal filed its opinion granting Mrs. Wederski's peremptory writ. In reaching its decision, the California Court of Appeal determined she had sufficiently alleged that her assent to all of the brokerage documents was induced by fraud (Pet.App.A, page 5a). After the opinion of the Court of Appeal was issued, petitioners filed a petition

for rehearing in which they contended for the first time in the Court of Appeal that the Court should specifically order a separate trial of the issue of fraudulent inducement and that the permeation doctrine was in conflict with Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400, 87 S.Ct. 1801, 1806, 18 L.Ed.2d 1270, 1277 (1967). The petition for rehearing was denied. The California Supreme Court subsequently denied petitioners' request for review (Pet. App.B).

ARGUMENT

The Petition should be denied forthwith since it is jurisdictionally and substantively defective. It is jurisdictionally defective in that it improperly requests this Court to review an un-

published interlocutory decision where none of the recognized special circumstances warranting immediate review are present.

The petition is also substantively defective in that it effectively requests the Court to depart from the express language of the Federal Arbitration Act, 9 U.S.C. §2, and its longstanding decision in Moseley v. Electronic Facilities, Inc., 374 U.S. 167, 83 S.Ct. 1815, 10 L.Ed.2d 818 (1963), the seminal case that the Court of Appeal relied upon.

I

THE PETITION SHOULD BE DENIED SINCE IT IS JURISDICTIONALLY DEFECTIVE

Preliminarily, the petition fails to meet the requirements for a writ of certiorari pursuant to 28 U.S.C. §1257(3)

because the decision below is not final and established exceptions to the finality requirement do not apply. Petitioners cite without discussion Southland Corp. v. Keating, 465 U.S. 1, 6-8, 104 S.Ct. 852, 856, 79 L.Ed.2d 1, 9-11 (1984) and Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 482-83, 95 S.Ct. 1029, 1039-1040, 43 L.Ed.2d 328, 341-342 (1975) in support of their contention that jurisdiction exists. In these two cases, jurisdiction was predicated upon 28 U.S.C. §1257(2) which, unlike 28 U.S.C. §1257(3), permits an appeal as of right. The Court observed in each case that unless an immediate appeal could be taken, the State Supreme Court decisions in question might remain unchallenged because the party seeking review might subsequently prevail on the merits, rendering the federal issues moot, and

the unreviewed state decisions might lead to a "serious erosion of federal policy." Id.

In the present case, there is no comparable danger that letting the decision of the state's highest court stand might erode federal policy. Both the Court of Appeal decision and the order of the California Supreme Court denying review are unpublished and therefore not only lack precedential value, but are effectively unknown to all but the litigants. The Court of Appeal opinion therefore will have an effect only upon the parties to the action.

Petitioners also seek review of the Court of Appeal's purported refusal to order a separate trial of the issue of fraudulent inducement. In the proceedings below, neither the trial court nor the appellate courts ruled on this issue

nor was any such ruling necessary to their decisions, and, thus, not only is there no final judgment from which an appeal can be taken, there simply is no judgment at all on this question. Indeed, the issue was not raised in the Court of Appeal by petitioners until they filed their petition for rehearing. Nothing in the opinion of the Court of Appeal or the order of the California Supreme Court purports to decide the question of whether petitioners are entitled to a separate trial of the issue of fraudulent inducement. The Court of Appeal decided only that the court below improperly ordered the matter submitted to arbitration and the proceedings stayed.

II

THE PETITION SHOULD BE DENIED SINCE THE THE THRESHOLD QUESTION OF WHETHER THE ARBITRATION AGREEMENTS WERE INDUCED BY FRAUD MUST BE DECIDED BY THE COURTS

Even if jurisdiction did exist under 28 U.S.C. §1257(3), the petition should nevertheless be denied.

This Court has repeatedly recognized that Section 2 of the FAA expressly provides that arbitration agreements are subject to revocation on such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. §2 and see Moseley v. Electronics Facilities, Inc., supra, 374 U.S. at 170-171, 83 S.Ct. at 1817-1818, 10 L.Ed.2d at 821 (1963); Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra, 388 U.S. at 400, 87 S.Ct. at 1806, 18 L.Ed.2d at 1277 (1967); Southland Corp. v. Keating, 465 U.S., supra, 465 U.S. at 10, 104 S.Ct. at

858, 79 L.Ed.2d at 12 (1984); and Shearson American Express, Inc. v. McMahon, 482 U.S. ___, ___, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185, 194 (1987).

In Moseley, this Court held that the question of fraud in the inducement of the arbitration agreement is a question that must initially be decided by the federal district courts rather than arbitrators. 374 U.S. at 170-172, 83 S.Ct. at 1817-1818, 10 L.Ed.2d at 821. As Chief Justice Warren and Justice Black noted in their concurring opinion: "[t]o allow this question to be decided by arbitrators would be to that extent to enforce the arbitration agreement even though steeped in the grossest kind of fraud." 374 U.S. at 172, 83 S.Ct. at 1818, 10 L.Ed.2d at 822. There, as here, the party's pleadings opposing arbitration "attacked not only the [contracts],

but also the arbitration clauses contained therein, as having been procured through fraud." 374 U.S. at 170-172, 83 S.Ct. at 1817, 10 L.Ed.2d at 821.

Four years later in Prima Paint, the case petitioners claim the California Court of Appeal's decision conflicts with, this Court held:

> [I]f the claim is fraud in the inducement of the arbitration clause itself - an issue which goes to the "making" of the agreement to arbitrate - the federal court may proceed to adjudicate it.

388 U.S. at 403-404, 87 S.Ct. at 1806, 18 L.Ed.2d at 1277. In the footnote that immediately follows the aforementioned quote, the Court emphasized its holding is consistent with Moseley and the FAA's statutory scheme, particularly with Section 2's "savings clause" which makes "arbitration agreements as enforceable as

other contracts, but not more so." Id., fn.12. The Court further noted:

> To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract - a situation inconsistent with the 'savings clause.'"

Id. The Prima Paint majority also emphasized that Prima Paint, unlike Mrs. Wederski, never claimed that the party seeking to enforce the arbitration agreements "fraudulently induced it to enter into the agreement to arbitrate...." 388 U.S. at 406, 87 S.Ct. at 1807, 18 L.Ed.2d at 1278-1279.

Just last term, in Shearson American Express, Inc. v. McMahon, supra, this Court also emphasized that "a well-founded claim" that an arbitration agreement was legally or equitably unenforceable should initially be decided

by the federal district courts in connection with federal securities claims. 482 U.S. at 107 S.Ct. at 2337, 96 L.Ed.2d at 194. See also Rush v. Oppenheimer & Co., Inc., ___ F.Supp.___, CCH FED.SEC.RPTR., Current Transfer Binder, ¶93,406 at page 97,117 (S.D.N.Y. 1987).

Prima Paint involved a matter brought in federal court and its express holding reflects it is strictly limited to federal courts. Nonetheless, it appears its principles are now applicable to state courts as well based on the Court's majority holding in Southland Corp. v. Keating, 465 U.S. at 12, 104 S.Ct. at 859, 79 L.Ed.2d at 13.

Applying the foregoing principles to the pending case, it is clear that the petition should be denied on substantive grounds since Mrs. Wederski's complaint

expressly alleges that the petitioners fraudulently induced her to sign the arbitration agreements. As noted above, Mrs. Wederski's complaint contains a separate section entitled "Fraudulent Inducement of the Arbitration And Choice of Law 'Agreements'"; this section sets forth numerous factual allegations attacking the arbitration agreements themselves on the grounds that they were induced by fraud (Opp.App.A, pages 11a-13a). Accordingly, petitioners' accusation that Mrs. Wederski's complaint contains "no allegation that the arbitration provision itself was induced by fraud (Pet., page i) is itself false and grossly misleading.

III

THE CALIFORNIA COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH PRIMA PAINT

The California Court of Appeal based its decision on its express finding that Mrs. Wederski's complaint had sufficiently alleged fraud induced her assent to all of the brokerage documents (Pet. App.A, page 5a). In order to have made this finding, the Court of Appeal had to determine that the complaint expressly alleged that the arbitration agreements themselves were induced by fraud. A review of Mrs. Wederski's complaint confirms that she did in fact specifically allege that the arbitration agreements themselves were induced by fraud. Therefore, the California Court of Appeal's holding does not conflict with Prima Paint.

IV

THE PERMEATION DOCTRINE DOES NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS

Petitioners' contention that the permeation doctrine is a creature of state law that conflicts with this Court's decision in Prima Paint is equally misplaced.

An examination of Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 67 Cal.App.3d 19, 136 Cal.Rptr. 378 (1977), the state case that the California Court of Appeal followed, confirms that its holding is based on this Court's holdings in Moseley and Prima Paint; it also reveals the so-called permeation doctrine is nothing more than a shortened restatement of this Court's holdings in Moseley.

Specifically, in Main, the California Court of Appeal held:

> [W]here it is alleged that fraud either induced the arbitration clause itself or permeated the entire agreement including the arbitration clause, that issue will be determined judicially and not by arbitration (emphasis added).

Main, 67 Cal.App.3d at 27.

In Moseley, this Court held:

> Petitioner attacks the subcontracts, as well as the arbitration agreement, as being fraudulent, and this issue, we conclude, must be first determined by the District Court.

374 U.S. at 169, 83 S.Ct. at 1816, 10 L.Ed.2d at 820.

Based upon the foregoing, it should be clear that the permeation doctrine is a restatement of Moseley. There is no substantive difference between alleging that all of the agreements, as well as the arbitration agreements, were induced by fraud (Moseley) and, on the other

hand, alleging that fraud permeated all of the agreements, including the arbitration clauses (Main).

Thus, the contention that the permeation doctrine conflicts with federal law is incorrect; on the contrary, it is a concept of federal substantive law that restates this Court's holding in Moseley.

V

THE COURT OF APPEAL'S SILENCE ON THE ON THE ISSUE OF A SUMMARY TRIAL WAS NOT ERROR

Petitioners argue that the Court of Appeal "refused to order a summary trial of the issue" of fraud in the making of the agreement to arbitrate. (Pet., page 12) In fact, the Court of Appeal did not address this question since the issue was not necessary to its decision and none of the parties to the appeal had discussed

it in their memoranda. The Court of Appeal said only that "[t]he truth of her [Mrs. Wederski's] allegations must be determined judicially" without commenting further upon the means by which the truth should be determined (Pet.App.A, page 5a). There is no inconsistency between the Court of Appeal's decision and the requirements of the Federal Arbitration Act.

CONCLUSION

For the reasons stated above, respondent and plaintiff Billie L. Wederski respectfully submits that the petition for a writ of certiorari of petitioners and defendants Dean Witter Reynolds, Inc.

and Henry H. Duke should be denied forthwith.

Dated: November 10, 1987

Respectfully submitted,

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APPENDIX A

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SUPERIOR COURT OF THE STATE OF

CALIFORNIA FOR THE COUNTY

OF ORANGE

BILLIE L. WEDERSKI, Plaintiff, v. DEAN WITTER REYNOLDS, INC. a corporation; ROGER MORRISON, an individual; HENRY H. DUKE, an individual; and DOES 1 through 10, inclusive, Defendants.	COMPLAINT FOR: 1. BREACH OF FIDUCIARY DUTIES; 2. FRAUD AND DECEIT; 3. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; AND 4. NEGLIGENCE AND GROSS NELIGENCE

PLAINTIFF BILLIE L. WEDERSKI ALLEGES AS FOLLOWS:

Common Allegations

1. Plaintiff Billie L. Wederski ("Plaintiff") is an individual residing in the County of Orange, California.

2. Defendant Dean Witter Reynolds, Inc. ("Dean Witter") is a corporation organized and existing under the laws of the State of Delaware and, at all times relevant hereto, was a registered broker-dealer authorized to transact business as a securities broker in the State of California and maintaining a branch office at 7088 Edinger Avenue, Huntington Beach, California ("Dean Witter's Huntington Beach Office").

3. Defendant Roger Morrison ("Morrison") is an individual believed to

be residing in the County of Orange, State of California. Plaintiff is informed and believes, and on that basis alleges, that at all times relevant hereto, Morrison was and is now a registered representative and employed as an account executive and investment advisor at Dean Witter's Huntington Beach Office and was and is now active in his capacity as a managing agent of Dean Witter and/or and acting within the course and scope of his employment with Dean Witter.

4. Defendant Henry H. Duke ("Duke") is an individual believed to be residing in the County of Orange, State of California. Plaintiff is informed and believes, and on that basis alleges, that at all relevant times hereto, Duke was and is now a registered representative and employed as a Vice-president of

investments and stockbroker at Dean Witter's Huntington Beach Office and was and is now active in his capacity as a managing agent of Dean Witter and/or acting within the course and scope of his employment with Dean Witter.

5. The true names and capacities of defendants named herein as DOES 1 through 10, inclusive, are unknown to Plaintiff, therefore, Plaintiff sues said DOE defendants by such fictitious names. Plaintiff is informed and believes, and on that basis alleges, that at all times relevant thereto, each of said DOE defendants participated in the acts set forth below and are responsible to the Plaintiff for the damages hereinafter set forth.

6. Plaintiff is informed and believes, and on that basis alleges, that at all times relevant hereto, Dean

Witter, Morrison, Duke and DOES 1 through 10, inclusive, were agents, servants, and employees of each other, and in doing the things hereinafter alleged, each of said defendants acting within the scope of his, her, or its authority as an agent, servant, and employee of the other defendants and with the permission and consent of such other defendants.

7. Defendant Dean Witter, at all times relevant hereto, authorized, approved or ratified all of the acts committed by Morrison, Duke, all DOE defendants and its other agents, servants and employees, and each of them, as alleged herein.

FIRST CLAIM FOR RELIEF

(Breach of Fiduciary Duty)

(Against All Defendants)

8. Plaintiff hereby incorporates by reference paragraphs 1 through 7, inclusive, above as though fully set forth at this place.

Creation and Acceptance of Fiduciary Relationship Between Plaintiff and Defendants

9. On or before November 30, 1984, Plaintiff opened an account with Dean Witter after speaking with Morrison (the "1984 November Meeting").

10. During the 1984 November Meeting, and continuously therafter, Dean Witter, by and through Morrison and/or Duke, expressly or impliedly represented

to Plaintiff that each of the defendants were reputable, experienced stock brokers and investment advisors that could and would provide Plaintiff with proper investment advice and counseling.

11. Plaintiff was impressed with said defendants' sincerity and apparent expertise and said defendants immediately gained Plaintiff's trust and confidence. The defendants, and each of them, knew or should have known Plaintiff reposed her trust and confidence in the defendants when she asked the defendants, and they agreed, to act as her stockbrokers and investment advisors and each of the defendants thereupon knew and understood a fiduciary relationship between Plaintiff and each of the defendants existed.

12. During and after the 1984 November Meeting, Plaintiff disclosed

confidential information about her personal and financial background based upon (a) the great trust and confidence she reposed in each of the defendants, (b) each defendants' understanding that they were to act as her stockbrokers and investment advisors, and (c) each defendants' understanding that Plaintiff believed the defendants would deal fairly and justly with Plaintiff in all respects. Each of the defendants knew and understood Plaintiff felt secure in seeking advice from, and entrusting her investment affairs to, each of the defendants.

Fraudulent Inducement of the
Arbitration And Choice of Law
"Agreements"

13. Plaintiff does not have, and the defendants have never given Plaintiff, a copy of any papers the defendants instructed her to sign. Plaintiff is now informed and believes, and on that basis alleges, that some of the papers the defendants induced her to sign may contain an arbitration clause and provision stating all legal rights and obligations shall be governed under the laws of New York rather than the laws of California ("choice of law provision").

14. Plaintiff is informed and believes, and on that basis alleges, that defendants will attempt to force her to arbitrate all of her claims against each of the defendants alleged herein and

attempt to apply the laws of the State of New York to all questions of law and fact.

15. Each of the defendants knew Plaintiff lacked investment experience, knew Plaintiff was unfamiliar with legal terms and concepts, particularly the laws of New York or California, knew Plaintiff never engaged in securities transactions, and knew Plaintiff had never maintained a securities account with any broker-dealer of securities before opening the Dean Witter Account. Nonetheless, and during the course of said defendants' fiduciary relationship with the Plaintiff, Dean Witter, by and through Morrison and/or Duke, made the following misrepresentations, fraudulently concealed, and/or omitted to fully disclose or fully explain the following material facts relating to provisions which Plaintiff is

informed and believes, and on that basis alleges, are contained in papers drafted by the defendants and which the defendants fraudulently induced and instructed her to sign sometime between November of 1984 up through the present:

(a) falsely represented that the papers were merely a formality and the sole purpose of the papers was to permit Plaintiff to open an account with Dean Witter;

(b) fraudulently concealed and/or failed to fully disclose or fully explain that the papers contained an arbitration clause and that, by signing the papers, Plaintiff would be, among other things, waiving her Constitutional right to a jury trial, effectively waiving her right to discovery and waiving her right to any meaningful appeal;

(c) fraudulently concealed and/or failed to fully disclose or fully explain that Dean Witter prefers arbitration over a jury trial in disputes with its customers and recognizes arbitration to be an advantage since the arbitration panels cannot award punitive damages under the laws of New York, and alternatively, arbitration panels rarely, if ever, award punitive damages against broker-dealers under California law even though the broker-dealers engaged in acts or practices that normally justify, and result in, an award of punitive damages in a jury trial;

(d) fraudulently concealed and/or failed to fully disclose or fully explain that in disputes or controversies between broker-dealers and its California customers, New York

laws provide less rights and protection than California law;

(e) fraudulently concealed and/or failed to disclose or fully explain that by signing the papers, defendants would execute transactions in Plaintiff's account without her prior authorization or consent.

16. Plaintiff believed the only purpose of the papers the defendants instructed her to sign was to effect the opening of an account with Dean Witter; Plaintiff never understood or agreed to (a) waive or relinquish her constitutional right to a jury trial before her peers (b) submit any controversies or disputes to arbitration, or (c) waive or relinquish her right to have all questions regarding her legal rights or disputes with defendants governed and controlled by California law rather than New York

law.

17. Due to the confidential and fiduciary relationship, and the trust and confidence Plaintiff reposed in said defendants, Plaintiff signed the papers as instructed by defendants and without reviewing the papers questioning the defendants about the contents. Had defendants fully disclosed and fully explained to Plaintiff the true nature and content of the papers, particularly the inclusion of the arbitration and choice of law clauses and the clauses' nature, meaning and effect on Plaintiff's right to, among other things, a jury trial and/or the differences in Plaintiff's legal rights, Plaintiff would have never signed any of the defendants' papers nor would have opened an account with Dean Witter, never waived her rights under California law, never agreed to

arbitration, and never entrusted the defendants with investing any part of the $694,640.65 in proceeds resulting from the sale of the land that she inherited from her mother as more fully explained below.

Additional Misrepresentations and Omissions

18. Shortly before August 5, 1985, Plaintiff learned that she would soon receive $694,640.65 from the sale of the land she recently inherited from her mother (the "inheritance proceeds").

19. On or about August 6, 1985, Plaintiff notified defendants Dean Witter and Morrison about the inheritance and sought their advice about investing the inheritance proceeds since Plaintiff lacked the skills, experience and

expertise to invest and manage such a large sum of money. Upon learning about the enormous sum of money Plaintiff would be receiving, Dean Witter, by and through Morrison, urged Plaintiff to speak with said defendants immediately about an appropriate manner to invest the inheritance proceeds.

20. On August 8, 1985, and based upon Dean Witter's urgings made by and through Morrison, Plaintiff invited Dean Witter, by and through Morrison, to accompany her to Modesto, California for the purpose of picking up the inheritance proceeds and advising her about a safe and suitable manner of investing the inheritance proceeds (the "Modesto trip").

21. During the Modesto trip, Plaintiff advised Dean Witter, by and through Morrison, that she had quit

working upon learning that the land she had inherited would soon be sold for $694,640.65. Accordingly, Plaintiff advised Dean Witter, by and through Morrison, and Dean Witter and Morrison understood, that Plaintiff's investment goal was to acquire conservative, fixed income investments that would produce sufficient income to meet Plaintiff's living expenses without using the principal amount of the inheritance proceeds. Moveover, Plaintiff also sought Dean Witter's advice, by and through Morrison, regarding a safe and suitable manner of investing, or placing in trust, about $428,000 of the inheritance proceeds to pay for estate taxes.

22. During the Modesto trip, Dean Witter, by and through Morrison, and with Duke's approval, made the following

express or implied representations, among others, which were designed to, and did, induce Plaintiff to repose further trust and confidence in each of the defendants' purported investment skills and induced Plaintiff to deposit the entire $694,640.65 of the inheritance proceeds in Plaintiff's account with Dean Witter:

(a) That the $428,000 Plaintiff owed for estate taxes on the inheritance proceeds would be set aside and deposited into a money market similar type of account and would not be used for other investment purposes;

(b) That said defendants would use a conservative, low-risk manner of investing the balance of Plaintiff's inheritance proceeds by acquiring a well-diversified portfolio of United States Treasury bonds and

conservative, low-risk equity stocks suitable for generating fixed income to meet Plaintiff's living expenses;

(c) That the investment strategy the defendants would employ would also enable the Plaintiff to meet her living expenses without having to withdraw or use the principal balance of the inheritance proceeds;

(d) That no transactions would be made in Plaintiff's account without her prior knowledge and authorization;

(e) That Plaintiff's account would constantly be monitored and supervised by Dean Witter, by and through Morrison and Duke, for any irregular, excessive or unauthorized transactions and that each of the defendants would provide Plaintiff

with accurate, complete and current reports relating to all transactions and the net equity in Plaintiff's account;

(e) That each of the defendants would always disclose and/or fully explain all material facts relating to Plaintiff's account and any matters relating to investments in Plaintiff's account;

(f) That each of the defendants would always place Plaintiff's best interests ahead of those the defendants and would not take advantage of the trust and confidence Plaintiff reposed in each of the defendants; and

(g) That each of the defendants would manage or supervise Plaintiff's account in a manner consistent with all applicable laws,

rules and regulations pertaining to stockbrokers and/or investment advisors.

23. The foregoing representations of defendants Dean Witter and Morrison were in fact false. The true facts, among others, were:

(a) That none of the defendants would set aside an appropriate amount for estate taxes and would use Plaintiff's full inheritance proceeds to, among other things, write uncovered or "naked" options contracts, execute commodities and futures transactions; all of which are extremely complex, risky investment strategies that would and did expose Plaintiff to financial liabilities and losses in excess of the full inheritance proceeds;

(b) That between August 9, 1985 and approximately March 19, 1986, ("the trading period"), nearly seven months, each defendant would churn Plaintiff's account by engaging in an excess of 215 transactions (about 30 transactions a month) and executed over $26,900,000 of purchase and sale transactions primarily for the benefit of generating commissions and profits for defendants;

(c) That each defendant would and did make excessive and unauthorized transactions;

(d) That each defendant would and did employ various unauthorized and risky investment strategies that were neither safe nor suitable given Plaintiff's financial condition and stated investment objective of fixed income;

(e) That each defendant would and did use Plaintiff's full inheritance in order to (1) cover the unauthorized and/or excessive naked options contracts and (2) leverage Plaintiff's buying power for purposes of generating margin interest charges against Plaintiff's account;

(f) That each defendant would and did place their own best interests ahead of Plaintiff's by engaging in a variety of unauthorized, excessive or risky transactions or investments or investment strategies that were primarily designed to generate commissions and profits for the defendants;

(g) That each defendant would and did sell securities to Plaintiff without disclosing or explaining that Dean Witter was making

a market in said securities before executing purchase orders for the securities and concealed the fact that defendants' commissions or profits were already factored into the price per share of said securities;

(h) That each defendant would and did send Plaintiff inaccurate and misleading periodic account reports that were designed to and did conceal the nature and extent of Plaintiff's losses and/or defendants' commissions or interest charges and falsely represented, among other things, that at all times during the trading period, the net equity in Plaintiff's account always exceeded the original amount of Plaintiff's inheritance proceeds;

(i) That none of the defendants would properly manage or

supervise all transactions in Plaintiff's account and would actually conceal the lack of supervision or proper management of Plaintiff's account by generating various inaccurate and the misleading periodic account reports prepared by Morrison, and approved on Duke, on behalf of Dean Witter;

(j) That defendants would not disclose or fully explain all risks or material facts relating to Plaintiff's account or transactions relating to Plaintiff's account; and

(k) That defendants would not manage or supervise Plaintiff's account in a manner consistent with all applicable laws, rules or regulations pertaining to stockbrokers or investment advisors.

24. In direct reliance on defendants' foregoing representations, and based upon Plaintiff's full trust and confidence in said defendants, Plaintiff was induced to, and did, entrust all of the inheritance proceeds to Dean Witter for the purpose of investing and managing the inheritance proceeds in a manner consistent with Plaintiff's aforementioned stated investment objective and investment concerns. During the evening of August 8, 1985, and immediately after returning from the Modesto trip, Plaintiff endorsed the check in the full amount of the inheritance proceeds to defendant Dean Witter and gave it to Dean Witter, by and through Morrison, to take home and deposit into Plaintiff's Dean Witter account the next day.

25. At all times mentioned hereinabove, each of the defendants

maintained a fiduciary relationship with Plaintiff, and each of the defendants had a fiduciary duty to (a) act in the highest good faith toward Plaintiff; (b) fully disclose and fully explain all material facts affecting Plaintiff's rights and interests; (c) not take advantage of trust and confidence Plaintiff's reposed in the defendants; and (d) place Plaintiff's best interests ahead of the interests of the defendants, and each of them.

26. Despite having voluntarily accepted the Plaintiffs trust and confidence reposed in each of them, said defendants committed a breach of their respective fiduciary duties owed to Plaintiff by engaging in the acts or conducts set forth above.

27. Plaintiff's reliance on the foregoing representations of the defen-

dants was justified inasmuch as defendants represented each of them were experienced, well-qualified, reputable stockbrokers and investment advisors and represented that each of them would act in a manner consistent with their respective fiduciary obligations and duties to Plaintiff.

28. Had defendants fully disclosed and fully explained the true facts to Plaintiff, Plaintiff would have never opened any account with Dean Witter, never signed any papers presented to her by Dean Witter or the other defendants, and never would have entrusted any part of the inheritance proceeds with any of the defendants.

29. As a direct and proximate result of the aforementioned acts and conduct of each of the defendants, Plaintiff has suffered compensatory

damages in an amount not yet ascertained, but which are presently estimated to exceed $850,000 and consisting of commissions charges, interest charges and losses due to unauthorized and/or excessive transactions. Furthermore, Plaintiff may incur additional losses in excess of $428,000 which represent the amount of estate taxes owed on the inheritance proceeds.

30. In doing the acts herein alleged, each of the defendants acted with oppression, fraud, and malice, and Plaintiff is entitled to punitive damages in the sum of at least $8,500,000 dollars inasmuch as Plaintiff is informed and believes, and on that basis alleges that, at all relevant times hereto, Dean Witter Morrison and Duke, and each of them:

(a) Knew Plaintiff was an unsophisticated investor and had

entrusted her entire inheritance proceeds with said defendants;

(b) Knew that said defendants gave Plaintiff improper investment advice and/or inaccurate account information that was primarily designed to cover up Plaintiff's losses the defendant's commissions and profits and the defendants' mishandling of Plaintiff's account;

(d) Knew that defendants were engaging in unauthorized, excessive and unsuitable transactions in Plaintiff's account and that such conduct constituted, among other things, fraud and/or a breach of their fiduciary duties to Plaintiff; and

(e) Knew that some or all of the foregoing acts, among other things, were improper and/or violated various laws, rules or regulations pertaining

to stockbrokers and investment advisors;

(f) Willfully elected to engage in such conduct as a risk of doing business since Dean Witter's experience is that the number of customers that actually institute legal proceedings after their accounts are mishandled, and the legal fees and costs of defending such claims or proceedings, are insignificant relative to the actual or potential revenues generated from such wrongful conduct, particularly if Dean Witter succeeds in avoiding a jury trial and punitive damages by way of the arbitration clause and choice of law provision.

SECOND CLAIM FOR RELIEF

(Fraud and Deceit)

(Against All Defendants)

31. Plaintiff hereby incorporates by reference paragraphs 1 through 30, above, as though fully set forth at this place.

32. Plaintiff is informed and believes, and on that basis alleges, that at the time of making the aforementioned misrepresentations or omissions of material facts, each of the defendants knew the misrepresentations or omissions of material facts were false and misleading. Plaintiff is informed and believes, and on that basis alleges, that the foregoing misrepresentations or omissions of material facts were made by each of the defendants with the intent to defraud and deceive Plaintiff and with the intent to

induce Plaintiff to rely on the foregoing misrepresentations and omissions to her detriment.

33. Plaintiff, at the times the misrepresentations and omissions set forth hereinabove, were made by Dean Witter, by and through Morrison and Duke, and at the time Plaintiff took the actions herein alleged, was ignorant of the falsity of said misrepresentations or omissions and believed them to be true.

34. As a direct and proximate result of the aforementioned fraud and deceit committed by defendants Dean Witter, Morrison and Duke, and each of them, Plaintiff has suffered compensatory damages in an amount not yet ascertained, but which are presently estimated to exceed $850,000 and consisting of commissions charges, interest charges and

losses due to unauthorized and/or excessive transactions.

THIRD CLAIM FOR RELIEF

(Negligent Infliction of Severe Emotional Distress)

(Against All Defendants)

35. Plaintiffs hereby incorporated by this reference the allegations of paragraphs 1 through 30, inclusive, above, as though fully set forth at this place.

36. The aforementioned acts and conduct of defendants, and each of them, were, among other things, negligent.

37. As a direct and proximate result of said defendants' aforementioned negligent acts and/or conduct, Plaintiff has suffered humiliation, mental anguish, severe emotional distress, and mental

distress, and has otherwise been injured in mind, body and/or spirit and has suffered damages in an amount not yet ascertained but which is in excess of $850,000.

FOURTH CLAIM FOR RELIEF

(Negligence and Gross Negligence)

38. Plaintiffs hereby incorporated by this reference the allegations of paragraphs 1 through 30, inclusive, and paragraphs 35 and 36, above, as though fully set forth at this place.

39. Each of the defendants failed and neglected to exercise such due care and diligence in performing their duties and obligations with respect to managing, supervising, conducting and directing investments in Plaintiff's account in that, at various times

relevant herein, each of said defendants violated their statutory and common law duties and obligations to Plaintiff by their actions, including, but not limited to, the negligent acts and omissions alleged hereinabove.

40. By the aforementioned acts of omissions, each of said defendants were negligent and grossly negligent and committed a breach of their statutory and common law duties and obligations to Plaintiff.

41. As a proximate result of such negligence and gross negligence, Plaintiff has suffered damages in an amount that cannot yet be fully ascertained, but is believed to exceed $850,000.

42. In doing the acts herein alleged, said defendants should have known that their acts or omissions would

cause damages to Plaintiff and committed said acts and omissions with a conscious disregard of Plaintiff's rights and, therefore, Plaintiff is entitled to recover punitive damages from said defendants of at least $8,500,000.

WHEREFORE, Plaintiff prays for judgment as follows:

1. As to each Claim, compensatory damages of at least $850,000 or according to proof;

2. As to each Claim, punitive damages in the amount of at least $8,500,000;

3. As to each Claim, for interest at the legal rate;

4. As to each Claim, for recission of all agreements by and between Plaintiff and each of the defendants;

5. For costs of suit herein; and

6. For such other and and further relief as the Court may deem just and proper.

DATED: May 2, 1986

KIRCHER & NAKAZATO
ARTHUR NAKAZATO

By: /s/
Arthur Nakazato

Attorneys for Plaintiff Billie L. Wederski

DATED: May 2, 1986

GREENWALD & RESNICK
LAW CORPORATION
BARNET RESNICK, ESQ.

By:/s/
Barnet Resnick

Attorneys for Plaintiff Billie L. Wederski

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 811 West Seventh Street, Suite 1100, Los Angeles, California, 90017.

On November 11, 1987, I served the within Opposition to Petition for a Writ of Certiorari to the Court of Appeal the State of California, Fourth Appellate District, Division Three in re: "Dean Witter Reynolds, Inc. vs. Billie L. Wederski" in the United States Supreme Court, October Term 1987, No. 87-595;

On the Parties in said action, by placing three copies therof enclosed in a sealed envelope with First Class postage fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Eugene W. Bell, Esq.
Jones, Bell, Simpson & Abbott
800 Wilshire Boulevard, 5th Floor
Los Angeles, CA 90017

Michael M. Gless, Esq.
Keesal, Young & Logan
Catalina Landing
310 Golden Shore, P.O. Box 1730
Long Beach, CA 90801-1730

All parties reqired to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on November 11, 1987, at Los Angeles, California.

Margaret E. Zepp